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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. DANIELLE MATKO, Defendant and Appellant.	A153140 (San Mateo County Super. Ct. No. 16SF000070A)

Appellant Danielle Matko, a teacher, was convicted after a jury trial of five counts arising from her sexual contact with two 15-year-old male students. She contends: (1) the court abused its discretion under Evidence Code section 352 by excluding evidence that her primary victim had once made a threat to commit a school shooting that was determined to be not credible; and (2) the conviction on one of the counts must be reversed because it was obtained after a readback of testimony that did not include the cross-examination of the relevant witness and was conducted outside appellant's presence. We affirm.

I. BACKGROUND

In 2015, appellant was a new English teacher at East Palo Alto Phoenix Academy. John Doe 1 was one of her students. Appellant had a casual demeanor, with an open-door policy with her students during free period where they could come by, do homework and ask her questions. She frequently bought her students lunch or let them drive her car, things the other teachers did not do.

Towards the end of August, John Doe 1 went to appellant's classroom to discuss difficulties she had in controlling her class. He concluded their conversation with a hug, but appellant unwrapped his arm and told him not to hug her.

In September or October, John Doe 1 stayed late to finish an essay appellant had offered to help him write. They were alone in the classroom. As John Doe 1 did his work, appellant locked the door, which was not normal. Appellant came close to John Doe 1 and asked him about his life. She rubbed her elbow on his inner thigh before unbuckling his pants and performing oral sex on him. When appellant stopped, she told John Doe 1 not to tell or it would be bad for him.

Another time, John Doe 1 walked into appellant's classroom during her prep period, and she asked him if he wanted to see her tattoos. She pulled down her shirt and showed him tattoos on her breasts—a planet and stars. Appellant asked John Doe 1 if he wanted to touch them, and grabbed his hands and made him touch her breasts.

Two or three weeks after the first incident of oral sex, appellant sent John Doe 1 a text message telling him to come by her classroom. John Doe 1 showed the text message to his friend, John Doe 2, and had him come with him. The two boys went to appellant's classroom, where she asked them about their plans and locked the door. She asked John Doe 2 if he had ever seen her tattoos, what bra size he thought she was and whether he wanted to touch her breasts. After John Doe 2 touched them,[1] appellant asked John Doe 1 if he wanted to touch her as well and he did so. Appellant directed John Doe 2 to step out of the room and she performed oral sex on John Doe 1. When it was over she threatened him physically and said if he told anyone she would sue him for slander.

Appellant frequently texted or did Facetime with John Doe 1 during their sexual relationship. Several times during their Facetime interactions, she showed him her breasts and said she wished he was with her. John Doe 1 took two screen shots of appellant's breasts. During one of their text message exchanges, they discussed another

[1] When he testified at trial, John Doe 2 did not remember touching appellant. He told an investigating detective that he had touched her, and John Doe 1 testified that John Doe 2 touched appellant.

student named Miguel who was involved in something having to do with a possible school shooting for which John Doe 1 was being blamed.[2] Nothing came of the situation and John Doe 1 did not get in trouble; appellant assured him she had his "back" and he shouldn't take the blame for something he didn't do.

After a conversation in which appellant threatened to sue him for slander, John Doe 1 didn't want to be near her anymore. Appellant sent John Doe 1 text messages commenting on his behavior and in one stated, "Still love you, even if you hate me." Once John Doe 1 started distancing himself from her, appellant changed her behavior toward him and started being stricter. Rumors were circulating that they had an inappropriate relationship.

John Doe 1 told John Doe 2 and his cousin what was going on with appellant, and at some point he disclosed the abuse to a lawyer who volunteered in a community program. John Doe 1 then told his parents, and the family filed a police report. About the same time, appellant told him by text that she had received a summons and was "freaking out." John Doe 1 made a pretext call to her monitored by the police in an attempt to get her to acknowledge giving him oral sex. Appellant denied the oral sex. When John Doe 1 asked to touch her tattoos again and wondered if she remembered letting him touch them, she stated, "What about 'em? Yeah," and "A lot of people have." Asked why she was letting other kids touch her, she stated, "Because it's not that serious."

A search of appellant's home revealed photographs of her cleavage area similar to the screen shots taken by John Doe 1. In a police interview at which she and her husband were present, appellant could not explain why John Doe I would accuse her and although she denied their relationship, she could not explain why he would have photographs of her breasts.

An information was filed charging appellant with two counts of oral copulation of a person under 16 by a person over 21 (Pen. Code, 288a, subd. (b)(2)) (counts 1 and 2)

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[2] Although it is not entirely clear from the record, we assume this incident is distinct from the alleged threats that give rise to the claim under Evidence Code section 352.

and four counts of lewd or lascivious acts on a child 14 or 15 years of age (Pen. Code, § 288, subd. (c)(1)) (counts 3-6). John Doe 1 was the named victim of five of the counts; John Doe 2 was the named victim of one lewd conduct count (count 6). Appellant was tried before a jury and convicted of one oral copulation count (count 1) and four lewd conduct counts (counts 3-6).

Appellant was sentenced to prison for an aggregate term of five years, which included the three-year upper term on the oral copulation count, eight months each (one-third the middle term) on three of the lewd conduct counts, and a concurrent sentence on the fourth lewd conduct count.

II. DISCUSSION

A. *Evidence Code section 352*

Appellant sought to introduce evidence that John Doe 1 had threatened to commit a school shooting, but that these threats were not prosecuted because they were deemed not credible. She argued that such evidence tended to impeach John Doe 1 because if he lied about the school shooting, it made it more likely he was fabricating the claim she had sexual contact with him. The court excluded the evidence, finding it more prejudicial than probative under Evidence Code section 352. We disagree that this was error.

Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." A prejudicial abuse of discretion will be found only if the trial court exercised its discretion in " 'an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice.' [Citations.]" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.) "Because the court's discretion to admit or exclude impeachment evidence 'is as broad as necessary to deal with the great variety of factual situations in which the issue arises' [citation], a reviewing court ordinarily will uphold the trial court's exercise of discretion [citations]." (*People v. Clark* (2011) 52 Cal.4th 856, 932.) That another court might have ruled differently than the trial court reveals nothing more than a difference of opinion and does

not establish that the trial court exceeded the bounds of reason. (*People v. Stewart* (1985) 171 Cal.App.3d 59, 65.)

The trial court did not abuse its discretion in excluding evidence that John Doe 1 had made threats to commit a school shooting. Although any prior lie has at least slight relevancy as to whether a witness is testifying truthfully, here it cannot be said with certainty that the threat to commit a shooting, even if ultimately found not credible, was *untruthful* when made. It was a matter that did not pertain directly to the sexual charges against appellant and was therefore collateral in nature. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9–10.) A trial court has broad discretion to exclude collateral evidence, even when it is offered for the purpose of impeaching a witness, when it is confusing or misleading. (*People v. Quartermain* (1997) 16 Cal.4th 600, 625; *People v. Price* (1991) 1 Cal.4th 324, 412.) The trial court could have reasonably concluded that given the inflammatory nature of school shootings, the evidence would likely sidetrack the jury from the issues at hand and result in a trial within a trial on that issue.

Appellant argues the exclusion of evidence of the prior threats violated her right to confront her accusers under the federal constitution. (U.S. Const., 6th Amend.) Again we disagree. Where evidence would impeach a witness on a collateral matter and is only slightly probative of veracity, its exclusion does not infringe on this constitutional right. (*People v. Jennings* (1991) 53 Cal.3d 334, 372.)

B. *Readback of Testimony*

1. Background

The jurors initially returned a guilty verdict on counts 1 and on counts 3 through 5. They indicated that further deliberations on the remaining two counts (counts 2 and 6) were likely to be productive, and the court ordered them to resume deliberations. The next day, the jurors requested a readback of "John Doe #1's testimony regarding charge # 2 after John Doe # 2 left the room." Defense counsel and the prosecutor reviewed the requested testimony and agreed to an excerpt responsive to the request, which was given to the jury during a hearing at which appellant was not present.

Defense counsel advised the court appellant had not been returned to court and he had been advised "that because of staffing or other reasons, that she would only be brought back to court if the jury had a verdict or if there was a question from the jury or some other order of the Court to bring her back," notwithstanding that she had been ordered brought back to court as of 9:00 a.m. that day. Appellant had been in a holding cell without bedding for over 20 hours and while defense counsel was not asking for an order, he wanted to note that the situation "starts to borderline on a violation of the Eighth Amendment."

The court was advised the jury had reached a verdict. At that point, the prosecutor noted there had been no cross-examination included in the readback and there was likely some cross-examination relevant to count 2. The court observed that both counsel had approved the readback and at that point, all they could do was ask the jury whether they were interested in the cross-examination on the same subject. Defense counsel indicated what had been read to the jury was responsive to their note and cross-examination hadn't come up until after they left the courtroom.

The court wrote a note to the jurors that stated, "There may have been some cross examination of John Doe #1 regarding charge 2 after John Doe # 2 left the room. Would you like . . . us to look for that cross-examination to read it back to you? You have only had the 'direct' testimony on that subject read back to you thus far." The jury responded negatively. With appellant personally present, the jury returned a verdict of guilty of count 6, lewd conduct on John Doe 2, but indicated they were hung on count 2, oral copulation of John Doe 1. The court dismissed that count on the prosecutor's request.

2. Omission of Cross-Examination

Penal Code section 1138 provides that when a jury requests a readback of testimony, "the information required must be given in the presence of, or after notice to, the prosecuting attorney, and the defendant or his counsel, or after they have been called." Appellant argues the court erred by not including the cross-examination in the portion of testimony read back to the jury. We reject the claim.

Defense counsel affirmatively agreed to the contents of the readback, thus forfeiting the issue. (*People v. Robinson* (2005) 37 Cal.4th 592, 634.) Nevertheless, the court attempted to remedy the situation after it was belatedly brought to its attention, by offering the jurors a chance to hear cross-examination. They declined. If the jurors did not wish to listen to the cross-examination, the defense could not compel the court to order them to do so. (See *People v. Ayala* (2000) 23 Cal.4th 225, 288.)

The federal authorities cited by appellant are not binding and in any event are distinguishable. (See *People v. Brooks* (2017) 3 Cal.5th 1, 90–91.) In *Riley v. Deeds* (9th Cir. 1995) 56 F.3d 1117, the trial judge was not available to respond to the jury's request for readback and the judge's law clerk instead presided. (*Id*. at p. 1118.) The jury foreperson was told to raise his hand when the jury had heard enough, and the foreperson did so after the direct examination of a witness was complete, foregoing any re-reading of the favorable cross-examination. (*Id*. at p. 1119.) Addressing the state's argument that a trial court generally has wide latitude in determining whether to have testimony read back, the court concluded a review for abuse of discretion would be inappropriate because there was no judicial discretion exercised in the first place. (*Id*. at pp. 1120–1122.) Here, the judge was present and exercised his discretion.

In *United States v. Hernandez* (9th Cir. 1994) 27 F.3d 1403, 1409, the court found clear error when the jurors were given a transcript of one witness's testimony during deliberations and no steps were taken to make sure they did not unduly emphasize it. The court noted the preferred method of rehearing testimony was in open court, under the supervision of the trial judge and with counsel present. (*Id*. at p. 1408.) The readback in this case was under the judge's supervision; the question was whether the jury could be compelled to hear cross-examination when they indicated they did not wish to do so.

In any event, even if we assume cognizable error, appellant was not prejudiced by the omission of cross-examination relevant to count 2. The jury did not reach a verdict on that count, and it was ultimately dismissed.

3. Appellant's Absence During Proceedings Related to Readback

Appellant argues count 6 must be reversed because she was absent from the proceedings when they discussed the readback of testimony. We find any error harmless beyond a reasonable doubt. (*People v. Hawthorne* (1992) 4 Cal.4th 43, 69; but see *People v. Avila* (2006) 38 Cal.4th 491, 598 [applying state law standard of prejudice to defendant's absence from readback without a waiver].) The jury asked to hear the portions of John Doe 1's testimony relevant to count 2. Appellant was not present for either the readback itself or the proceedings leading to the readback, but she was not convicted of count 2. Even if there was a violation of appellant's right to be present at a critical stage of the proceedings, she has not met her burden of demonstrating prejudice. (See *People v. Jenkins* (2000) 22 Cal.4th 900, 1027 [finding error based on violation of Penal Code section 1138 harmless beyond a reasonable doubt].)[3]

III. DISPOSITION

The judgment is affirmed.

[3] We note that while defense counsel wanted to make a record regarding the circumstances of appellant's confinement, he did not object to proceeding in her absence.

NEEDHAM, J.

We concur.

JONES, P.J.

BURNS, J.

(A153140)